



DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 514

RIN 3141-AA77

Annual Fee Calculation

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission is amending agency procedures for calculating the amount of annual fee a gaming operation owes the National Indian Gaming Commission. The amendment excludes certain promotional credits from the calculation of the annual fee a gaming operation owes.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Austin Badger, National Indian Gaming Commission; 1849 C Street NW, MS 1621, Washington, DC 20240.
Telephone: 202-632-7003.

SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (NIGC or Commission) and sets out a comprehensive framework for the regulation of gaming on Indian lands. The IGRA established an agency funding framework whereby gaming operations licensed by tribes pay a fee to the Commission for each gaming operation that conducts Class II

or Class III gaming activity that is regulated pursuant to IGRA. 25 U.S.C. 2717(a)(1). These fees are used to fund the Commission in carrying out its regulatory authority. On August 15 1991, the NIGC published a final rule in the **Federal Register** called Annual Fees Payable By Class II Gaming Operations. 58 FR 5831. The rule added a new part to the Commission's regulations to provide direction and guidance to Class II gaming operations to enable them to compute and pay the annual fees as authorized by the Indian Gaming Regulatory Act. The Commission has substantively amended them numerous times, most recently in 2018 (83 FR 2903).

II. Development of the Rule

On, June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Commission intended to consult on a number of topics, including proposed changes to the fee regulations. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendment to the fee regulations were intended to provide clarity as to whether a tribal gaming operation must include certain promotional credits, commonly referred to as “free play,” as “money wagered” for purposes of calculating the annual fee. The Commission held two virtual consultation sessions in July of 2021 to receive tribal input on the possible changes.

The Commission reviewed all comments received as part of the consultation process. After considering the comments received from the public and through tribal consultations, the Commission published a notice of proposed rulemaking on December 2, 2021. 86 FR 68445.

III. Review of Public Comments

The Commission received the following comments in response to our notice of proposed rulemaking.

Comment: Commenters recommended that the exclusion for promotional credits be mandatory rather than at the discretion of the tribal gaming operation. Commenters believe that the exclusion must be mandatory to prevent tribal gaming operations from paying fees on revenues that are not recognized under Generally Accepted Accounting Principles. Commenters also believe that discretionary language permits the NIGC to determine whether to accept the exclusion of promotional credits from the calculation of assessable gross revenues by tribal gaming operations on a discretionary basis. Finally, commenters believe that discretionary language may prompt reconsideration of promotional credit treatment in tribal-state compacts.

Response: The Commission accepts this recommendation to provide a uniform calculation of the annual fee. The Commission initially made the deduction discretionary because it noted that a sizeable percentage of tribe gaming operations were not deducting promotional credits from the calculation of fees. The Commission had hoped that through consultation it would gain insight into those tribes' reasons for including free play in the calculation of fees. When the subject was not addressed by any tribes during consultation, the Commission drafted a notice of proposed rulemaking that maintained the discretionary nature of the withholding. Again, Commenters unanimously called for the deduction to be made mandatory. The Commission agrees that promotional credits should not be included in the calculation of fees. To ensure that fees are calculated uniformly across the Tribal gaming industry, it has adopted language as set forth below. The Commission further clarifies, however, that this regulation is limited to NIGC fee calculations and is not intended to affect revenue calculations for any other purposes.

Comment: Commenters are concerned that the phrase "can demonstrate" does not provide a clear standard for the deduction.

Response: The Commission agrees that the phrase “can demonstrate” is redundant and has removed the phrase. The Commission notes that “promotional gaming credits” means Gaming credits issued to patrons for wagering that have no cash redemption value; typically used as “Free Play” for gaming machine, table games, and other gaming activity promotions. The Commission further notes that all fee calculations must continue to be reconciled with a tribe’s audited or reviewed financial statements pursuant to 25 CFR 514.6.

Comment: Commenters recommended incorporating the promotional credit exclusion provision within the text of 25 CFR 514.4(c) rather than as a new paragraph.

Response: The Commission agrees that the simplified promotional credit exclusion provision may be included within 25 CFR 514.4(c).

Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions, nor will the rule have a significant adverse effect on

competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 3141–0007.

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC’s consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian Tribe’s formal relationship with the Commission; or the consideration of the Commission’s trust responsibilities to Indian tribes. As discussed above, the NIGC engaged in extensive consultation on this topic and received and considered comments in developing this rule.

List of Subjects in 25 CFR Part 514

Gambling, Indian--lands, Indian--tribal government, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Commission amends 25 CFR part 514 as follows:

PART 514 – FEES

1. The authority citation for part 514 continues to read:

Authority: 25 U.S.C. 2706, 2710, 2717, 2717a.

2. Amend § 514.4 by revising paragraph (c) to read as follows:

§ 514.4 How does a gaming operation calculate the amount of the annual fee it owes?

* * * * *

(c) For purposes of computing fees, assessable gross revenues for each gaming operation are the total amount of money wagered on class II and III games, plus entry

fees (including table or card fees), less any amounts paid out as prizes or paid for prizes awarded, less any amounts wagered that the gaming operation issued as promotional credits, and less an allowance for capital expenditures for structures as reflected in the gaming operation's audited financial statements.

* * * * *

Dated: August 31, 2022, Washington, DC.

E. Sequoyah Simermeyer,
Chairman.

Jeannie Hovland,
Vice Chair.

[FR Doc. 2022-19217 Filed: 9/2/2022 8:45 am; Publication Date: 9/6/2022]